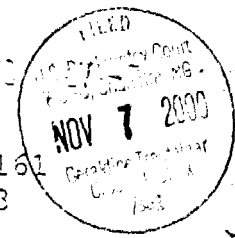


UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION



IN RE:)
)
JOHN CHARLES JORDAN,)
)
Debtor.)
_____)

Case No. 00-31161
Chapter 13

JUDGEMENT ENTERED ON NOV 7 - 2000

ORDER GRANTING MOTION OF RELIEF OF STAY OF CITIFINANCIAL
MORTGAGE COMPANY

This matter is before the court upon the Motion for Relief from Stay filed by Citifinancial Mortgage Company ("Citifinancial") and the debtor's ("Jordan") Response. The court has concluded that the motion should be granted for the following reasons:

1. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2).
2. This matter came on after proper notice to all parties and all parties are properly before this court.
3. On May 31, 2000, Jordan filed a petition with the Bankruptcy Court for the Western District of North Carolina, Charlotte Division, under Chapter 13 of Title 11 of the United States Code.
4. On the day the petition was filed, Jordan was the owner of real property at 4132 Redwood Avenue, Charlotte, North Carolina 28205 (the "Property"). Jordan's schedules disclosed that the

Property was not his residence and that the value of the Property was less than the debt it secured.

5. The Property is subject to Citifinancial's first lien by deed of trust. This deed of trust secures a note in favor of Citifinancial in the original principal amount of \$49,125.00, dated May 27, 1998. The note is in default in the amount of \$8,728.66. Jordan's petition states that Citifinancial's debt is \$52,000.00 and the value of the property is \$39,040.00

6. On August 30, 2000, the court entered an Order confirming Jordan's Chapter 13 Plan ("Plan"). In his Plan, Jordan listed Citifinancial as a holder of a secured claim. In parentheses following this listing, Jordan's Plan states that "Debtor will be allowed six months from date of confirmation to sell property, and debtor will not be required to make regular payments pending sale."

7. Jordan's defense to Citifinancial's motion for relief from stay is: (a) Citifinancial is bound by the confirmed Plan to allow the debtor six months to sell the property; and (b) therefore, Citifinancial is barred from exercising its rights pursuant to 11 U.S.C. § 362(d). The court disagrees and will not give binding effect to Jordan's Plan because it is inconsistent with the Bankruptcy Code, and because to enforce the provision would deny Citifinancial its property rights without due process.

A. Jordan's Plan is inconsistent with the Code

8. Jordan's petition discloses that he is not using the property as a residence, that its value is less than the debt it secures, and that no form of adequate protection is offered to Citifinancial. Thus, Jordan's parenthetical Chapter 13 Plan provision has the effect of denying Citifinancial its adequate protection rights explicitly conferred to secured creditors by the Code in section 362.

9. Section 1322(b) of the Code provides debtors with significant leeway to develop plans unique to the needs of each debtor. Nonetheless, section 1322(b)(10) limits a debtor from including in a plan any provision "inconsistent with [Title 11]." Section 1322(b)(1) comports with common sense: Each individual debtor can use section 1322(b)'s flexibility to design a Chapter 13 plan meeting individual needs; however, under no circumstances can a plan substantively rewrite the Bankruptcy Code.

10. A recent case in this circuit demonstrates the effect of section 1322(b). In In re Stevens, 236 B.R. 350 (Bankr. E.D.Va. 1999), a confirmed Chapter 13 plan contained a provision stating that consummation of the plan would establish an undue hardship necessary to discharge an educational loan. 236 B.R. at 352. The Stevens court held that a Chapter 13 plan cannot contain such a provision because it conflicts with another portion of the Code, § 523(a)(8). 236 B.R. 352.

11. The facts of this case are similar to the facts in Stevens. Here, Jordan has placed a provision in his Plan that effectively bars Citifinancial from exercising its right to seek adequate protection of its collateral or relief from stay under § 362(d) of the Code. Consequently, Jordan's parenthetical Plan provision is inconsistent with 11 U.S.C. § 362 and will not be given effect.

B. Jordan's Plan denies Citifinancial its property rights without due process

12. Section 1327 of the Code, entitled "Effect of Confirmation," provides in relevant part:

The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

11 U.S.C. 1327(a). Courts have taken widely varying approaches in determining the nature of the "binding" effect of a Chapter 13 confirmation order -- ranging from a rigid application of the plain language to giving the order little effect. Compare In re Szostek, 885 F.2d 1405 (3d Cir. 1989) and In re Pence, 905 F.2d 1107 (7th Cir. 1990) (rigid effect), with Fawcett v. United States, 758 F.2d 588 (11th Cir. 1985), and In re Pacana, 125 B.R. 19 (B.A.P. 9th Cir. 1991) (little effect). So far as it is important to this case, the Fourth Circuit Court of Appeals has held that a confirmation order may be given res judicata effect only if the affected creditor has been afforded due process by proper notice:

a bankruptcy court confirmation order generally is treated as res judicata. However, we cannot defer to such an order on res judicata grounds if it would result in a denial of due process in violation of the Fifth Amendment of the United States Constitution. The United States Supreme Court has concluded that 'an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections.'

Piedmont Trust Bank v. Linkous, 990 F.2d 160, 162 (4th Cir. 1993) (citations omitted).

13. Jordan's Plan provision violates the due process clause because it provides constitutionally insufficient notice that it has altered the standard Chapter 13 form plan. Neither the plan nor any other process specifically notified Citifinancial of how its rights were being affected in the confirmation process, or of its right to be heard on the issues involved.

14. This court has recently disavowed this practice in a similar context. In the case of In re Emory, Case No. 99-40608 (Bankr. W.D.N.C., September 14, 2000), the debtor listed a creditor's debt of her proposed Chapter 13 Plan as "Property to be Surrendered in Full Satisfaction of Debt." The debtor neither filed a motion to value her lien in conjunction with her Chapter 13 plan nor did she file a separate motion. Apparently, the debtor attempted to value her lien and surrender the collateral simultaneously in full satisfaction of the lien, without following the procedural requisites contained in Section 506 and Bankruptcy

Rule 3012. The court concluded that "instead of filing a motion, [Emory] simply buried her statement that she intended to satisfy the lien by surrender in an applicable part of the plan. She now asks the Court to declare that notation controlling. The Court will not honor this request." The court found that such an attempt at "stealth valuation" provided inadequate notice to the creditor and therefore affronted the Fifth Amendment.

15. Here, Jordan's parenthetical provision does not provide Citifinancial with adequate notice of the debtor's proposed treatment of its claim. Although the provision was printed in bold type, it is simply a parenthetical statement contained in a detailed, multi-page plan summary that contains many other provisions relating to other creditors. The relief the debtor seeks is extraordinary, but it is expressed in a routine portion of the Chapter 13 Plan summary. No specific notice was given to Citifinancial that would reasonably appraise it of the relief sought against it and of its opportunity to be heard on the issues.

16. The Fourth Circuit has indicated that for the provisions of a Chapter 13 plan to be binding on the lien rights of secured creditors, there must be adequate notice directed to the creditor that specifically identifies the relief sought and the opportunity for a hearing. This may be accomplished in the plan or by motion, adversary proceeding, or other procedures as the Bankruptcy Rules provide. If the request for relief is contained in plan summary,

the notice must at least be as sufficient as would have been required if the request was made by a separate filing. In any case, the notice must be "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950).

17. The initial processing of Chapter 13 cases in this court is a high volume process. Over 3,600 Chapter 13 cases were filed in this district in the last year. In addition, the process is streamlined in order to begin payments to creditors as quickly as possible. In order to accomplish that fairly, the court has adopted a form Chapter 13 Plan summary so that all parties can rely on the standard contents of a plan without having to "flyspeck" each provision. The court believes that, in that context, the debtor must take extra care to insure that creditors are given adequate notice of any deviation from the standard form and any extraordinary relief sought.

18. The court does not believe that Citifinancial was given adequate notice of Jordan's proposed treatment of its lien rights here. Consequently, Citifinancial is not bound by that provision of Jordan's Plan.

C. Citifinancial is entitled to relief from the automatic stay

19. The evidence in the record demonstrates that although Jordan is attempting to market the property, there is no equity in the property that could be realized upon sale. The property is therefore not necessary for an effective reorganization of the debtor. Further, Jordan has proposed no adequate protection for Citifinancial. Accordingly, Citifinancial is entitled to relief from the automatic stay pursuant to section 362(d) of the Code.

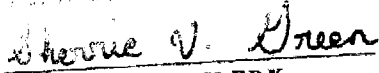
It is therefore **ORDERED** that Citifinancial is granted relief from the automatic stay of section 362(d) of the Code with respect to Debtor's property encumbered by Citifinancial's deed of trust.



George R. Hodges
United States Bankruptcy Judge

CELESTINE COUNTY CLERK AND
CORRECTOR OF THE ORIGINAL
DEED BOOKS OF THE COURT

WESTERN DISTRICT OF K.C.

BY: 

DEPUTY CLERK

DATE: 11-7-21